UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RESIDENT COUNCILS OF WASHINGTON, et al.,

Plaintiffs,

v.

TOMMY G. THOMPSON, Secretary of United States Department of Health and Human Services,

Defendant.

No. C04-1691Z

ORDER

I. BACKGROUND

Plaintiffs' challenge the decision of Defendant Secretary of Health and Human Services (the "Secretary" or "Defendant") to promulgate regulations allowing the use of paid "feeding assistants" in federally regulated nursing homes. The challenged regulations were promulgated by the United States Department of Health and Human Services' Centers for Medicare & Medicaid Services ("CMS") and allow states to permit long term care facilities participating in Medicare and/or Medicaid to use paid feeding assistants to supplement the services of certified "nurse aides" ("CNAs") under certain conditions. See First Amended Complaint, docket no. 14, ¶¶ 1– 5.

Plaintiffs Resident Councils of Washington ("Resident Councils") and the Washington State Long-Term Care Ombudsman Program (the "Ombudsman Program")

challenge the "feeding assistant" regulations. Resident Councils is a non-profit organization consisting of nursing home residents; the organization's primary goal is to empower residents and protect nursing home quality of care. Id. at ¶¶ 7, 48. The Ombudsman Program was created by statute and represents Washington long-term care facility residents; its mission is to promote the interests, well-being, and rights of its members. Id. at ¶¶ 8, 55. In an earlier Order the Court dismissed individual Plaintiffs because they were unable to make a showing of any injury. See Order, docket no. 71, at 6.

The parties agree that feeding a resident with a complex feeding problem, such as a swallowing disorder or recurrent lung aspirations, requires at least a nurse aide level of training. The parties disagree as to whether less complicated feeding assistance may be provided by individuals without nurse aid training. CMS contends that performing simple tasks such as opening a milk carton, cutting meat, reminding a patient to eat, providing dinner conversation for a depressed patient, and spoon feeding a resident who cannot feed him or herself, does not require nurse aid training.[1] CMS contends these routine, yet time-consuming tasks, are critical to ensuring that nursing home residents take in sufficient nutrients and fluids, but are not "nursing or nursing-related" services.

A. The Nursing Home Reform Act.

In 1987, through the Omnibus Budget Reconciliation Act of 1987 (the "Nursing Home Reform Law" or "Reform Law"), Congress enacted a comprehensive set of nursing home reforms applicable to facilities that have provider agreements under Medicare and Medicaid. The goal of the reforms was to improve the quality of care in nursing homes. The Reform Law imposed new requirements on nursing homes participating in Medicare or Medicaid and enacted measures to improve the enforcement process. The Reform Law

[1] The final rule acknowledged that workers who pass out trays, provide beverages and condiments, talk to and encourage residents, record food intake, and perform routine dining room tasks need not be trained as feeding assistants if they do not feed residents. 68 Fed. Reg. 55,528, 55,532-33 (2003).

added significant requirements for nursing home operation in the areas of resident services, residents' rights, the survey and certification process, and the enforcement process. See 42 U.S.C. §§ 1395i-3, 1396r.

The Reform Law imposed the following new requirements relating to resident services: (1) a nursing home must care for its residents "in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident," 42 U.S.C. §§ 1395i-3(b)(1)(A), 1396r(b)(1)(A); (2) a nursing home must prepare a written plan of care for each resident, which describes the services and activities that the facility plans to provide to meet the resident's individual needs, id. at §§ 1395i-3(b)(2), 1396r(b)(2); (3) a nursing home must conduct a standardized resident assessment for each resident, which identifies medical problems and assesses the resident's capability to perform daily life functions, and which is conducted or coordinated by a registered professional nurse at least annually, but which can be updated or performed more frequently if deemed necessary by nursing personnel, id. at §§ 1395i-3(b)(3), 1396r(b)(3); (4) a nursing home must provide or arrange for the provision of all services necessary to carry out each resident's plan of care, id. at §§ 1395i-3(b)(4), 1396r(b)(4); (5) a nursing home may use only full-time "nurse aides" who have received training and are competent, id. at §§ 1395i-3(b)(5), 1396r(b)(5); (6) a nursing home must provide resident medical care under the supervision of a physician, id. at § 1395i-3(b)(6), 1396r(b)(6); (7) a nursing home with more than 120 beds must employ at least one social worker, id. at §§ 1395i-3(b)(7), 1396r(b)(7); and (8) a nursing home must post certain information on nurse staffing, id. at §§ 1395i-3(b)(8), 1396r(b)(8).

The legislative history for the Nursing Home Reform Law indicates that Congress was "deeply troubled that the Federal government, through the Medicaid program, continues to pay nursing facilities for providing poor quality care to vulnerable elderly and disabled beneficiaries." H.R. Rep. No. 100-391(I) at 452, reprinted in 1987 U.S.C.C.A.N. at

2313-272. Various studies and reports documented inadequate, "sometimes shockingly deficient" care being provided at government certified nursing homes. Id. Accordingly, the "central purpose" of the Reform Law was "to improve the quality of care for Medicaid-eligible nursing home residents, and either to bring substandard facilities into compliance with Medicaid eligibility quality of care requirements or to exclude them from the program." Id.

At issue in this litigation is statutory language requiring training and competency for nurse aides working in nursing homes. The requirements state that a nursing home "must not use on a full-time basis any individual as a nurse aide in the facility . . . for more than 4 months unless the individual . . . has completed a training and competency evaluation program . . . and . . . is competent to provide nursing or nursing-related services." 42 U.S.C. §§ 1395i-3(b)(5)(A), 1396r(b)(5)(A). Congress defined a "nurse aide" to mean "any individual providing *nursing or nursing-related services* to residents in a skilled nursing facility, but does not include an individual (i) who is a licensed health professional . . . or a registered dietician, or (ii) who volunteers to provide such services without monetary compensation." Id. at §§ 1395i-3(b)(5)(F), 1396r(b)(5)(F) (emphasis added).

While Congress provided a definition of "licensed health professional," it did not provide a definition for the phrase "nursing or nursing-related services."

B. Regulatory Background.

In 1991, CMS's predecessor, the Health Care Financing Administration ("HCFA"), issued regulations implementing the nurse aide training and competency requirements. See 42 C.F.R. § 483.152; 56 Fed. Reg. 48,880 (Sept. 26, 1991). The regulations required that for a nurse aide training and competency evaluation program to be approved by a state, it must consist of a minimum of 75 hours of training. 42 C.F.R. § 483.152(a)(1). The regulations enumerated certain topics which must be included in the training curriculum. Id. at

§ 483.152(b). The category of "personal care skills" included the topics "assisting with eating and hydration" and "proper feeding techniques." Id. at § 483.152(b)(3)(v), (vi).

The regulations used the same definition for "nurse aide" provided in the Reform Law. A nurse aide was defined as "any individual providing *nursing or nursing-related services* to residents in a facility who is not a licensed health professional, a registered dietitian, or someone who volunteers to provide such services without pay." Id. at § 483.75(e)(1) (emphasis added); see also 56 Fed. Reg. 48,880, 48,890. Anyone performing nursing or nursing-related services who was not a licensed health professional, registered dietician, or volunteer, had to comply with the nurse aide training and competency requirements. 56 Fed. Reg. at 48,890. The agency did clarify that "an individual must be directly involved in patient care to meet the definition of nurse aide. For example, an individual who makes unoccupied beds or fills water pitchers would not necessarily be a nurse aide and therefore may not have to meet the nurse aide requirement." Id.

In the 1991 regulations, the agency did not specifically address whether a nursing home could employ feeding assistants, but the implication of the final agency rule is that any individual directly involved in patient care would be required to meet the nurse aide training and competency requirements. The agency subsequently took this position in responding to inquiries on the subject, and interpreted assisting a resident with eating as a "nursing-related" service. The agency concluded that only certified nurse aides, volunteers, or health professionals could feed residents. See, e.g., Plaintiffs' Motion, docket no. 50, Ex. 2 (Steinfort Letter), Ex. 3 (HCFA Website Q&A), Ex. 4 (Harkin Letter).

C. Promulgation of "Feeding Assistant" Regulations.

On March 29, 2002, CMS proposed a rule change that would allow states to permit nursing homes to use paid feeding assistants to supplement the services of certified nurse aides for patients without complicated feeding problems. See Notice of Proposed Rulemaking, 67 Fed. Reg. 15,149 (Mar. 29, 2002). CMS announced the proposed rule

change and solicited public comments. Id. Because of the agency's prior position that feeding assistance was a "nursing-related" service, see, e.g., Plaintiffs' Motion, docket no. 50, Ex. 4 (Harkin Letter), the rule change represented a change in policy and the agency's prior position on "feeding assistants." CMS acknowledged that the proposed rule amounted to a change in policy. See Notice of Proposed Rulemaking, 67 Fed. Reg. at 15,150-51 ("[t]here is no provision in Federal regulations for the employment of nursing home workers who perform only a single task without completing 75 hours of nurse aide training. Currently, residents must be fed by a registered nurse, licensed practice nurse, or a nurse aide who has completed 75 hours of medical training and who has been certified as competent to perform all nurse aide tasks.").

CMS explained that the proposed rule change was necessitated by changing trends in long-term care, and the realities of long-term care. Concerns included a growing shortage of nurse aides, the time-consuming nature of feeding assistance, increasing demands on nurse aides, and an increasing aged population. Id. at 15,150-51. CMS described the positive experience of two states that were using paid feeding assistants. Id. at 15,151. The preamble concluded with the agency's assessment that the benefits to residents of the rule change outweighed the risks, and with the agency's conclusion that a policy change to allow the use of feeding assistants could be accommodated under existing federal law. Id.

The proposed rule solicited comments from the public. Id. at 15,149. CMS received over 6,000 public comments on the proposed rule. 68 Fed. Reg. 55,528, 55,530; see also Administrative Record ("AR") (filed November 24, 2004 per Local Rule CR79(h)). Ninety-nine percent of the comments supported the proposal. 68 Fed. Reg. at 55,530. Plaintiffs argue that many of these comments were form letters submitted by the nursing home

industry, and that the 99 percent is misleading as it relates to source. See Borromeo Decl., docket no. 82.[2] Nevertheless, there was substantial support for the proposal.

CMS promulgated the feeding assistant regulations in final form on September 26, 2003, and they became effective shortly thereafter on October 27, 2003. See 68 Fed. Reg. 55,528.

D. Final Regulations.

The final regulations allow states the option of permitting nursing homes to use feeding assistants under limited circumstances. The regulations only permit the use of feeding assistants where it is also permitted by state law. 42 C.F.R. § 483.35(h)(1)(ii). Before feeding any resident, a feeding assistant must successfully complete a state-approved training course meeting various requirements. Id. at §§ 483.35(h)(1)(I), 483.75(q). Under the challenged regulations, a feeding assistant may feed only those residents who have no complicated feeding problems. Id. at § 483.35(h)(3)(I). The regulations provide that complicated feeding problems include, but are not limited to, difficulty swallowing, recurrent lung aspirations, and tube or parenteral/IV feedings. Id. at § 483.35(h)(3)(ii). The selection of residents who qualify to be fed by a feeding assistant must be based on the charge nurse's assessment and the resident's latest assessment and plan of care. Id. at § 483.35(h)(3)(iii). A feeding assistant must work under the supervision of a registered nurse or licensed practical nurse. Id. at § 483.35(h)(2)(i). In an emergency, a feeding assistant must call a supervisory nurse for help on the resident call system. Id. at § 483.35(h)(2)(ii). The final rule also states that feeding assistants are to supplement, not replace, CNAs. 68 Fed. Reg. at 55,529,

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[2] Plaintiffs created a comprehensive system for coding and tabulation of comment letters. The letters were input into Microsoft Excel and Access for tracking and analysis. See Borromeo Decl., docket no. 82, at ¶¶ 3-4. Ninety-three percent of letters submitted by nursing staff in support of the proposal were form letters. Id. at ¶ 7. Seventy-six percent of letters submitted by Nursing Directors were form letters. Id. at ¶ 9. However, the Court rejects the Plaintiffs' assertion that the Secretary "cannot rely credibly" on any of the comment letters that were form letters. See Plaintiffs' Opp., docket no. 81, at 21. The Court agrees that the Secretary was absolutely entitled to rely upon the comment letters he received.

55,530. The regulations provide that a state-approved training course for feeding assistants must include, at a minimum, eight hours of training. 42 C.F.R. § 483.160(a). Washington State has adopted the feeding assistant regulations. See Washington Department of Social and Health Services, Aging and Disability Services Administration: Memorandum NH #2004-004 (Feb. 23, 2004), available at http://www.aasa.dshs.wa.gov/professional/letters/nh/2004/04-004.htm.[3]

Plaintiffs challenge the feeding assistant regulations alleging that they violate the Nursing Home Reform Law and the Administrative Procedure Act, 5 U.S.C. § 701 et seq. The Parties have filed cross-motions for summary judgment. In addition, the American Health Care Association ("AHCA"), which was previously denied intervenor-Defendant status, seeks to participate as amicus curiae. The Court DENIES AHCA's motion to participate as amicus curiae, docket no. 85. The issues before the Court on summary judgment have been fully addressed by the parties and additional briefing is not required.

II. DISCUSSION

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the opposing party must show that there is a genuine issue of fact for trial. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must present significant and probative evidence to support its claim or defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir.

[3] Twenty-eight states have authorized use of feeding assistants in nursing homes; an additional three states – Alabama, Arkansas, and Michigan – are developing plans to authorize use of feeding assistants in the near future. See Edelman Decl., docket no. 52, Ex. A (State Laws and Policies Relating to Feeding Assistants). CMS has estimated that of the 17,000 nursing homes in the country subject to the Nursing Home Reform Law, about 20% of them ultimately will employ feeding assistants. 68 Fed. Reg. 55,536.

1991). The parties to this case agree that there is no genuine issue of material fact and that this dispute is ripe for consideration on summary judgment. See Plaintiffs' Motion, docket no. 50, at 2; see also Defendant's Cross-Motion, docket no. 80, at 14.

The Administrative Procedure Act ("APA") governs judicial review of agency action. See 5 U.S.C. § 701 et seq. Under the APA, a district court may set aside formal agency action, such as the promulgation of the challenged feeding assistant regulations, only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at § 706(2)(A); Wilderness Society v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1059 (9th Cir. 2003) (en banc).

A. Violation of Nursing Home Reform Law

The parties dispute whether single task workers providing feeding assistance provide a nursing-related services in violation of the Nursing Home Reform Law. Plaintiffs argue that the Secretary's interpretation of the phrase "nursing or nursing-related services" to exclude the feeding of residents under the conditions set forth in the regulations directly conflicts with the fundamental purpose of the Nursing Home Reform Law.

The Secretary bears the primary responsibility for administering the Nursing Home Reform Law, and his interpretation is entitled to substantial deference upon judicial review. Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1068 (9th Cir. 1998). The Court may not "simply impose its own construction on the statute" without regard to the Secretary's regulations. Chevron U. S. A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Under Chevron, the Court engages in a two-step analysis of agency statutory interpretation:

> Under the first step: If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . . Conversely, at step two of Chevron, when applicable, we recognize that if a statute is silent or ambiguous with respect to the issue at hand, then the reviewing court must defer to the agency so long as the agency's answer is based on a permissible construction of the statute.

Wilderness Society, 353 F.3d at 1059 (internal quotation marks and citations omitted); see also CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1162 (9th Cir. 1999).

1. Clear intent of Congress

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Wilderness Society, 353 F.3d at 1059. In determining whether Congress has "directly" spoken to the "precise" question at issue, see Chevron, 467 U.S. at 842, the Court applies "'traditional tools of statutory construction,' and if a court using these tools ascertains that Congress had a clear intent on the question at issue, that intent must be given effect as law." Wilderness Society, 353 F.3d at 1059 (quoting Chevron, 467 U.S. at 843 n.9). "Questions of congressional intent 'are still firmly within the province of the courts under Chevron.'" Id. at 1059; see also Defenders of Wildlife, 191 F.3d at 1164.

Canons of statutory construction help provide meaning to words in a statute, and the Court must begin with the language of the statute. Wilderness Society, 353 F.3d at 1060 (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56 (1987) ("It is well settled that the starting point for interpreting a statute is the language of the statute itself.") (internal quotation marks and citation omitted). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Id. (citing United States v. Smith, 155 F.3d 1051, 1057 (9th Cir. 1998)). The words of a statute must be read in context with a view to their place in the overall statutory scheme. Id. If necessary to discern the intent of Congress, the Court "may read statutory terms in light of the purpose of the statute." Id. Thus, the structure and purpose of a statute may provide guidance in determining the plain meaning of its provisions. Id.; see also United States v. Lewis, 67 F.3d 225, 228-29 (9th Cir. 1995) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme."). Where the language of

the statute is clear, the Court may not defer to an agency's interpretation. Medtronic, Inc. v. Lohr, 518 U.S. 470, 512 (1996).

Defendant argues that Congress did not express its intent as to whether feeding assistants aiding nursing home residents without complicated feeding problems is a "nursing-related service." See Defendant's Cross-Motion, docket no. 80, at 16. Defendant notes that Congress did not define the phrase "nursing or nursing-related services," in either the statute or its legislative history, see 42 U.S.C.§§ 1395i-3(b)(5)(F), 1396r(b)(5)(F); H.R. Rep. No. 100-391(I) at 457, 930, reprinted in 1987 U.S.C.C.A.N. at 2313-277, 2313-547. Defendant contends that there is no common or universally accepted meaning of the phrase to which the Court may refer. In addition, Defendant argues that the mere fact that nurse aides routinely provide feeding assistance is of no consequence, because feeding assistants would never assist persons with pronounced eating complications. See 68 Fed. Reg. 55,528, 55,530-31. Defendant urges the Court to consider a relatively narrow question: whether feeding assistants perform "nursing-related" services when they assist *only* residents without complicated feeding problems.

Plaintiffs counter that the Nursing Home Reform Law was remedial in nature, seeking to resolve problems within the nursing home industry; as such, Plaintiffs argue a broad construction is warranted to effectuate the "clear intent" of Congress. See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (It is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."); see also Hason v. Medical Bd. of California, 279 F.3d 1167, 1172 (9th Cir. 2002).[4]

Plaintiffs argue this case is analogous to the Ninth Circuit's recent en banc decision in Wilderness Society. In that case, the Ninth Circuit analyzed the "language, purpose, and

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[4] Plaintiffs argue that Congress's explicit delegation of tasks to the Secretary in the Reform Law suggests that Congress did not intend to implicitly delegate to the Secretary the authority to define the phrase "nursing or nursing-related services." See Plaintiffs' Opp., docket no. 81, at 6-8. This contention is without supporting legal authority and ignores the distinction between explicit and implicit delegation of authority. See, e.g., Chevron, 467 U.S. at 843-44.

structure" of the federal Wilderness Act which defined "wilderness," in part, as "an area where the earth and its community of life are untrammeled by man." Id. at 1061. The statute barred "commercial enterprise" in wilderness areas. Id. The Ninth Circuit stated that "[b]ecause the aim of Congress in the Wilderness Act to prohibit commercial enterprise within designated wilderness is clear, we do not owe deference to the USFWS's determination regarding the permissibility of the Enhancement Project if it is a commercial enterprise." Id. at 1062 (citing Chevron, 467 U.S. at 842-43). Similarly, this Court would owe no deference to CMS's determination regarding the permissibility of feeding assistants, if it found that feeding assistants perform nursing-related services.

Plaintiffs argue that the language, purpose, and structure of the Nursing Home Reform Law demonstrates congressional intent to require all hands-on nursing home care to be provided exclusively by licensed health professionals, registered dieticians, and CNAs. Plaintiffs note that a significant component of the Nursing Home Reform Law is increased nurse staffing requirements and the establishment of federal standards for nurse aide certification. Thus, Plaintiffs contend the Reform Law's purpose – to resolve issues of substandard nursing home care – is relevant in this context. Plaintiffs urge that because paid feeding assistants will not be CNAs, and will not be subject to federal CNA training and competency requirements, the purpose of the Reform Law will be frustrated. Plaintiffs contend that allowing single-task feeding assistants may lead to other single-task workers (e.g. bathing assistants, toilet assistants, dressing assistants, transfer assistants, etc.), resulting in a handful of CNAs working in concert with numerous poorly trained "single-task" workers.

However, whether the Reform Law addresses the issue of single task workers or the definition of "nursing-related services" is not resolved by speculation about the future of

single-task workers or collateral impacts of promulgated regulations.[5] The statute does not define "nursing or nursing-related services." See 42 U.S.C.§§ 1395i-3(b)(5)(F), 1396r(b)(5)(F). There is nothing in the statute that equates "nursing or nursing-related services" with "all hands-on nursing home care" as Plaintiffs allege. See Plaintiffs' Motion, docket no. 50, at 13. Plaintiffs' argument that these regulations will have an impact on nurse aide training requirements is unpersuasive, because the final rule provides that feeding assistants may supplement, but not replace, CNAs. See 68 Fed. Reg. 55,528, 55,529; 67 Fed. Reg. 15,149, 15,150. The Court is persuaded by the Defendant's argument that its interpretation of "nursing or nursing-related services" to allow nursing homes to supplement their nursing staff with employees solely to provide additional assistance furthers the purpose of the Reform Law to improve the quality of care in nursing homes, and thus is an entirely reasonable construction of the statute. See Defendant's Cross-Motion, docket no. 80, at 15.

Congress did not define the phrase "nursing or nursing-related service" in either the Reform Law or its legislative history. As such, the Court agrees with the Defendant that Congress has not directly addressed the precise question at issue and has left to the Secretary the task of providing meaning and context to the phrase. Thus, the Court considers step two of Chevron to determine if the agency's interpretation is reasonable and is not contrary to congressional intent.[6]

2. Chevron deference

> "If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the

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[5] The regulations challenged in this lawsuit do not deal with any other class of single-task worker.

[6] Plaintiffs concede that a significant portion of a feeding assistant's tasks are not "nursing or nursing-related" services that would require nurse aid training. See Plaintiffs' Opp., docket no. 81, at 15. Plaintiffs insist, however, that where feeding assistants provide encouragement and minimal assistance with eating or drinking the feeding assistant performs a "nursing-related" service. The Court agrees with the Secretary that this apparent conflict in position undermines the Plaintiffs' contention that "nursing or nursing-related services" means all hands-on care provided to residents. See Defendants' Resp., docket no. 84, at 8-9.

> statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Chevron, 467 U.S. at 843. In determining whether an agency's construction of a statute is permissible, "'the [C]ourt need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the [C]ourt would have reached if the question initially had arisen in a judicial proceeding,' but only that the agency's interpretation is reasonable and is not contrary to congressional intent." Seldovia Native Ass'n v. Lujan, 904 F.2d 1335, 1342 (9th Cir. 1990) (quoting Chevron, 467 U.S. at 843 n. 11)). Plaintiffs argue the Secretary's decision is entitled to no deference because "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." See I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987). The agency's "new" position is entitled to deference only if "the agency *acknowledges and explains* the departure from its prior views." Seldovia, 904 F.2d at 1346 (emphasis added). An "initial agency interpretation is not instantly carved in stone and the agency, to engage in informed rulemaking, must consider varying interpreattions and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 863-64. "An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) (internal citations and quotations omitted).[7]

[7] Plaintiffs argue that the Secretary's statutory interpretation of "nursing or nursing-related services" is a *post hoc* rationalization for the agency action, inconsistent with the agency's prior assertion that "nursing or nursing-related services" was "definable." See Plaintiffs' Reply, docket no. 81, at 2. This argument is without merit. The final rule acknowledged that "'nursing' or 'nursing related' skills" were undefined in the legislation. See 68 Fed. Reg. 55,528.

a. The Agency's Interpretation.

CMS determined some nursing home residents need only minimal assistance or encouragement at mealtimes and that such assistance does not require nursing training, and does not constitute a "nursing-related" service. Plaintiffs urge that the final regulations frustrate Congressional intent and thus are not a permissible interpretation of the reform law. See, e.g., Akhtar v. Burzynski, 384 F.3d 1193, 1198 (9th Cir. 2004) ("We do not owe deference, however, to agency regulations if they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy.").

Plaintiffs argue that the Secretary's interpretation will frustrate Congressional intent because it will result in a reduced quality of care in nursing home facilities. See Plaintiffs' Motion, docket no. 50, at 20-21. However, this argument is pure speculation. There is no support in the record for Plaintiffs' conclusion that the implementation of the feeding assistant regulations will result in a reduced level of care.

Plaintiffs also argue that the feeding assistant regulations will frustrate Congressional intent because they would allow for other single-task workers. See Plaintiffs' Motion, docket no. 50, at 21. This unsupported speculation does not assist the Court with the question presented.

Lastly, Plaintiffs argue that the feeding assistant regulations will frustrate Congressional intent because nurse aide training is inadequate. Id. (citing HHS OIG, Nurse Aide Training, Rep. No. OEI-05-01-00030 (2002) (hereafter "HHS OIG, Nurse Aide Training"), available at oig.hhs.gov/oei/reports/oei-05-01-00030.pdf). The HHS report cited by the Plaintiffs concludes that "nurse aide training has not kept pace with nursing home industry needs." HHS OIG, Nurse Aide Training, at 9. However, even if true, the fact that nurse aide training may not have kept pace with nursing home industry needs has no bearing on the Court's inquiry as to whether feeding assistant regulations frustrate Congressional intent.

CMS received over 6,000 public comments on the proposed rule, with ninety-nine percent of comments in support of the proposal. 68 Fed. Reg. 55,528, 55,530. Nursing professionals providing comments considered feeding assistant tasks to be "non-nursing" tasks. See, e.g., Defendant's Cross-Motion, docket no. 80, Ex. A (RR 1887, 7583). In addition, the record reflects CMS's response to comments adverse to the regulations, including the addition of provisions specifically defining conditions that would preclude the use of a feeding assistant, see 42 C.F.R. § 483.35(h)(3)(ii); requiring training prior to resident care, see id. at § 483.35(h)(1)(i); and more frequent assessment of a resident's condition. See id. at § 483.35(h)(3)(iii). The successful use of feeding assistant programs in Wisconsin and North Dakota further supports the reasonableness of the challenged regulations. 68 Fed. Reg. at 55,530; see also Defendant's Cross-Motion, docket no. 80, Ex. A (RR 5542-43) (discussing two research studies that support the value of using single-task workers who focus on assisting elders to eat and drink); Ex. B (RR 5826-33) (letter of support from Wisconsin Association of Homes and Services for the Aging, discussing successful use of feeding assistants in Wisconsin); Ex. C (RR 2626-27) (discussing a North Dakota nursing home's positive experience with feeding assistants).

CMS argues that the fact that nursing home residents receive inadequate feeding assistance is well documented. See Defendant's Cross-Motion, docket no. 80, at 23 (citing CMS Report to Congress, Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes, at chapter 14, available at http://www.cms.hhs.gov/medicaid/reports/rp700-14.pdf.). CMS points to numerous comments as evidence of an ongoing CNA shortage. See Defendant's Cross-Motion, docket no. 80, Ex. A (RR 66-67, 80, 4094, 4142, 4151-54, 4198, 4234-35, 4535, 5485, 5487, 5822, 6920, 8649-50). The agency concluded that the feeding assistant regulations address the problem by providing a way for nursing homes to ease the burden of overworked nurse aides and meet the nutrition and hydration needs of residents. Lastly, the Court notes that Plaintiffs have proffered no evidence that the proposed

regulations will cause harm to nursing home residents beyond mere speculation and conjecture.

The Court concludes that the regulations are not inconsistent with the intent of Congress to improve the quality of nursing home care and do not violate the Nursing Home Reform Law. The determination by CMS that feeding assistants under the regulations do not provide "nursing-related" services is a permissible interpretation of the Reform law that does not frustrate Congressional intent.

B. Administrative Procedure Act

The APA governs judicial review of agency action. 5 U.S.C. § 701 et seq. The district court may set aside formal agency action that is arbitrary and capricious, or an abuse of discretion. Id. at § 706(2)(A); see also Wilderness Society, 353 F.3d at 1059. Plaintiffs claim that CMS acted arbitrarily and capriciously by promulgating the feeding assistant regulations. Plaintiffs allege that CMS acted without sufficient evidentiary support for its policy change, without proper evidence regarding feeding assistant programs in Wisconsin and North Dakota, and without considering all the evidence relating to the nurse aide shortage.

The scope of review under the arbitrary and capricious standard is narrow, and the Court must not substitute its judgment for that of the agency. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Id. (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). In considering whether an agency's action was arbitrary and capricious, the "agency's action must be upheld, if at all, on the basis articulated by the agency itself." Beno v. Shalala, 30 F.3d 1057, 1074 (9th Cir. 1994).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

> that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle, 463 U.S. at 43.

1. State Feeding Assistant Programs

Plaintiffs first argue that the Secretary has no evidence which supports the claims of success with feeding assistants in Wisconsin and North Dakota. The Secretary relied on the alleged success in these states in the promulgation of feeding assistant regulations. Plaintiffs allege the lack of evidence means that the Secretary's decision is necessarily arbitrary and capricious, because it lacks foundation and evidentiary support.

The agency alleges that the feeding assistant regulations are supported by evidence of positive results from Wisconsin and North Dakota, and an absence of evidence of negative reports from those states. See Defendant's Cross-Motion, docket no. 80, Ex. A (RR 5542-43) (letter summarizing results of two research studies on the effects of using single-task feeding assistants); Ex. B (RR 5833) (Secretary of Wisconsin DHFS statement that "there have been no poor outcomes nor care violations related to single task workers"); Ex. C (RR 9067-68) (North Dakota Board of Nursing statement that North Dakota's use of feeding assistants for over ten years did not result in reports of decreased patient safety); Ex. C (RR 5876) (letter from the North Dakota congressional delegation referencing positive results of feeding assistant programs). Defendant also relied on comment letters from Wisconsin and North Dakota residents attesting the value of the feeding assistant programs.

Plaintiffs' claims that the Secretary's promulgation of feeding assistant regulations was not supported by "credible" evidence must fail. The Secretary's reliance on evidence from Wisconsin and North Dakota was justified. Those states were conducting feeding assistant programs and their experiences were relevant to the consideration of the proposed regulation. Plaintiffs allegation that there was insufficient evidence must also fail.[8] The

[8] After the promulgation of the final regulations, CMS continued to consider the merits of opposition to paid feeding assistants. CMS sent a Request for Task Order Proposal (RTOP)

Secretary's decision was supported on the evidence, and the Court cannot conclude it was arbitrary and capricious.

2. Nurse Aide Shortage

Plaintiffs second argument is that in justifying feeding assistant regulations, the Defendant did not consider the actual reasons behind the nurse aide labor shortage. Plaintiffs argue that the regulations implicitly and incorrectly assume that nurse aide shortages result from the training requirement, while the real reason for the shortage relates to nurse aide retention. Plaintiffs and Defendant acknowledge it is difficult to retain nurse aides because of low wages, poor benefits, and difficult work. CMS claims it considered numerous reasons for the nurse aide labor shortage and determined that relieving stress on nurse aides by allowing feeding assistants would help with retention issues. CMS acknowledges high vacancy and turnover rates among nurse aides; however, it claims that its decision to address the nurse aide shortage in this manner was not arbitrary and capricious.

Plaintiffs argument that CMS did not properly consider the reasons behind the nurse aide shortage is without merit. The agency acknowledged the factors Plaintiffs claim were not considered. See 68 Fed. Reg. 55,528, 55,529 at n. 1, 2, 3. Plaintiffs contention that Defendant did not adequately consider or address these concerns in the regulations must fail.

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on June 18, 2004, soliciting proposals for a "Study of Paid Feeding Assistant Programs." See Plaintiffs' Motion, docket no. 50, Ex. 14. Plaintiffs note that the Request admitted that "little is actually known about the effects of having paid feeding assistants in nursing homes" and argue that the Request concedes the anecdotal nature of the information received from Wisconsin and North Dakota. Id. at 3-4. However, characterization of the evidence relied upon as merely anecdotal ignores the informal reports by the states of the positive effects of the programs, and the numerous positive comments received from residents. In addition, the Request for Proposal evidences an intent by CMS to investigate the merits of opposition to feeding assistants and possible negative effects on the quality of care in nursing homes through a formal study. However, the Request for Proposal does not establish that CMS had an insufficient evidentiary basis for its regulation or that it acted in an arbitrary and capricious manner.

3. Change of Policy

Plaintiffs' final argument is that the Defendant's reversal of policy in itself evidences an arbitrary and capricious change in policy. Plaintiffs argue these circumstances are similar to Fund for Animals v. Norton, 294 F. Supp. 2d 92, 105 (D. D.C. 2003), where the Court discussed "administration" related agency policy changes:

> The Court is faced with the review of an agency decision that amounts to a 180 degree reversal from a decision on the same issue made by a previous administration . . . . This dramatic change in course, in a relatively short period of time and conspicuously timed with the change in administrations, represents precisely the reversal of the agency's views that triggers an agency's responsibility to supply a reasoned explanation for the change.

Id. at 105 (D. D.C. 2003) (internal quotation marks and citations omitted). Plaintiffs argue that the policy change in this case requires a reasoned explanation because it is a "180 degree reversal" of prior agency policy. Plaintiffs argue there is no support for the change in the record.

Plaintiffs argument is unpersuasive. Regardless of any change in administration, the agency policy change was well supported and explained by the agency. Unlike Fund for Animals, where the Court concluded the agency explanation was "unreasoned" and "quintessentially arbitrary and capricious," the policy change at issue here was explained by the Secretary and based on evidence before the agency. Dissenting viewpoints were acknowledged and addressed. The documented workforce needs of the industry and the needs of nursing home residents were considered. The feeding assistant regulations were promulgated in response. Moreover, the characterization of the agency policy change as a "180 degree reversal" overstates the actual change in agency policy. While the final regulation allowing for feeding assistants in limited circumstances certainly represents a change in policy, it only reverses prior agency interpretation under limited circumstances. The Court therefore concludes that Defendant's adoption of the feeding assistant regulations was not arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A).

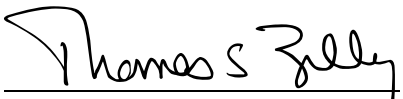
III. CONCLUSION

For the reasons stated in this Order, the Court DENIES the Plaintiffs' Motion for Summary Judgment, docket no. 50 and GRANTS the Defendant's Cross-Motion for Summary Judgment, docket no. 80. The Court DENIES the American Health Care Association's Motion to file and Amicus Curiae brief, docket no. 85.

Also pending before the Court is Plaintiffs' Motion to Certify Class, docket no. 54. Because the Court grants the Defendant's Cross-Motion for Summary Judgment, docket no. 80, the Court STRIKES AS MOOT the Plaintiffs' Motion to Certify Class, docket no. 54.

IT IS SO ORDERED.

Dated this 31st day of August, 2005.



Thomas S. Zilly
United States District Judge